IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 21-0972

State of West Virginia,
Respondent,

v.

Jay Folse,
Petitioner.

(An appeal of a final order of the Circuit Court of Monongalia County, Case No.: 21-MAP-12)

PETITIONER'S BRIEF

Counsel for the Petitioner, Jay Folse

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

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2. The Circuit Court erred by failing to make any findings on collateral claims raised in the Petitioner's Petition for Appeal and/or Motion to Dismiss: (a) that his speedy trial rights were violated, and (b) that his charges lacked any probable cause.

STATEMENT OF THE CASE

This case began following the attendance by the Petitioner, Jay Folse, at a West Virginia University (WVU) Board of Governors meeting held at the MountainLair on the campus of West Virginia University in Morgantown, Monongalia County. According to the criminal complaint, the Petitioner was "in the WVU MountainLair Rhododendron room attempting to attend a Board of Governors meeting." The officer "walked over to the WVU MountainLair Rhododendron Room, where Mr. Jay Folse, a trespassed individual was setting. Mr. Folse was previously trespassed from all WVU property." (Appendix Record ["A.R."] at 11).

The officer allegedly "asked Mr. Folse multiple times to leave the room and speak with [the officer] outside, in an attempt to not cause a disturbance, he refused several times and was argumentative." (A.R., at 11). The officer claimed to have "placed Mr. Folse in an escorted position to remove him from the room, [Mr. Folse] then swung his arm actively resisting [the officer]." The officer further claimed that "Mr. Folse became combative and he flipped backwards out of the chair he was seated on and at that point [the officer] gained control by

pinning Mr. Folse to place him under arrest." (A.R., at 11). The complaint concluded: "At this time Mr. Folse yelled stop and said 'just arrest me'. Mr. Folse then agreed to stop resisting and was placed in handcuffs with no further incident. He was transported to WVU PD for processing." (A.R., at 11).

Based on this set of allegations, the Petitioner was charged in Monongalia County Magistrate Court with one count of Disorderly Conduct, one count of Obstruction, and one count of Trespass on Student Residence Premises or Student Facility Premises, on July 31, 2019. (A.R., at 10-15). On or about August 30, 2019, the State, without alleging any violation of the terms or conditions of bond up to that point, moved for a modification of the Petitioner's bond conditions to prohibit him from being on WVU property, or having any contact with any agent of WVU other than its counsel, Seth Hayes, Esq. This motion was granted on September 6, 2019. (A.R., at 16-17).

The State then filed a motion to revoke the Petitioner's bond based upon new charges filed against the Petitioner in Mercer County, West Virginia, relating to the Petitioner's dispute with the gas company that was servicing his property in Bluefield.[1] (A.R., at 18-23). At the hearing set on that motion, a plea agreement was reached, at which time the Petitioner agreed to plead no contest to one count of obstructing, with the other two charges being dismissed. A 90 day jail sentence would be suspended for two years of probation, a term of which would be a prohibition on entering WVU property or contact with any WVU employee except for its designated counsel. (A.R., at 25). The Petitioner was not represented by counsel. (A.R., at 25). The Petitioner was sentenced in accordance with this agreement. (A.R., at 28-30).

It is the Petitioner's contention that he then filed an appeal of his conviction. The record

1 All charges relating to this incident in Mercer County were subsequently dismissed. (A.R., at 71).

of the magistrate court does not reflect that any such document was placed in the court file. (A.R., at 7). However, handwritten notes contained within the Magistrate Court file note that the State was served with an appeal on January 6, 2020, and that the Petitioner called into the Magistrate Court office on January 13, 2020.[2] (A.R., at 37, 39). The notes further seem to indicate that the Petitioner was told that an individual named "Ami" would by processing the appeal, and that someone (presumably the Petitioner) called Ami several times. (A.R., at 37).

No further action took place in the case until January 11, 2021, at which time the Petitioner filed, *pro se*, a "Motion for Dismissal Due to Failure to Provide Speedy Trial," which alleged that his appeal had not been heard in a timely fashion, and therefore, he was entitled to the dismissal of his underlying charges with prejudice. (A.R., at 36). A hearing was scheduled and took place before Magistrate Nabors, but no order apparently resulted from the hearing. (A.R., at 7, 73). The Petitioner also filed a Petition for Writ of Mandamus, before the Monongalia County Circuit Court, civil action no. 21-C-108, requesting an order requiring the magistrate court to docket his appeal. (A.R., at 40-46). After protracted briefing, (A.R., at 47-66), and a hearing, Circuit Judge Cindy Scott entered an order allowing the Petitioner to perfect his appeal within 20 days of the July, 28, 2021 order date. (A.R., at 67-68).

The Petitioner then (re)filed his Petition for Appeal. (A.R., at 69-77). In his petition, he alleged that the charges against him were "entirely without probable cause." (A.R., at 69). He alleged that although the case was assigned to Magistrate Holepit, that other Magistrates had taken action in his case in violation of Rule 2 of the Administrative Rules of Magistrate Court. (A.R., at 69). He asserted that he filed motions that were never ruled upon. (A.R., at 70). He asserted that he was threatened with immediate incarceration if he did not accept the plea

2 The State later acknowledged receiving the copy of the appeal. A.R., at 53.

agreement that was offered to him. (A.R., at 71). He claimed to be entitled to appeal from a plea agreement because he was not represented by counsel at the time of his plea pursuant to statutory authority. (A.R., at 72, 73-74). He claimed that he had, in fact, provided an appeal to the magistrate court, but that it had not been filed or forwarded to the Circuit Court due to a conclusion among court staff that it was improper to appeal following a plea agreement. (A.R., at 72).

On or about August 4, 2022, the Petitioner filed a "Motion to Dismiss" in the Circuit Court in the magistrate appeal matter. In this document, he raised issues relating to his prosecution including a lack of probable cause, a first amendment overbreadth/vagueness challenge to the obstruction statute, and a speedy trial challenge. (A.R., at 78-85). A hearing took place before Circuit Judge Phillip Gaujot on September 3, 2021, ostensibly for the purpose of considering the Petitioner's recent motion to modify the terms of his bond. (A.R., at 86). However, rather than limit the purpose of the hearing to the bond modification issue, the Court ultimately dismissed the appeal entirely:

> THE COURT: All right. I find that this matter came on for hearing on a plea agreement, that the plea agreement was signed by Mr. Folse. Pursuant to that plea agreement, he pled guilty -- a no contest plea to obstruction. The other two charges were dismissed. An appeal has -- was not timely filed. Therefore, a motion for change of bond conditions and your motion to dismiss is untimely. This matter has been dismissed based upon a satisfactory plea of no contest. This matter, Case Number 19-M-3409 is hereby dismissed.
>
> The Court would recommend, Mr. Folse, that you hire a lawyer that knows what he's talking about.

(A.R., at 100-101).

Upon inquiry by the Court of the Petitioner, the following exchange took place and concluded the hearing:

THE COURT: How about you, Mr. Folse, anything else from you?

MR. FOLSE: Yes. I need a written decision on this so I can appeal it to the Supreme Court. Will you get me a written decision?

THE COURT: There will be a written order. In fact, Mr. Brown is ordered to prepare that order.
Anything else?

MR. BROWN: Nothing from the State, Judge.

THE COURT: Anything else from you, Mr. Folse?

MR. FOLSE: Yeah. I'm just kind of surprised. I thought it was going to be pretty straightforward to have my bond condition to be changed. I just don't understand why I'm not allowed to have that. I'm just at a little bit of a loss. I thought it was pretty straightforward.

THE COURT: Yeah. I just stated the reason. Mr. Brown will reduce that reasoning to a written order. Anything else?

MR. FOLSE: When you said -- yeah. I'm just trying to understand. When you said that the appeal was untimely, were you referring to simply the fact that I had already entered a plea? Or are you trying to state that the appeal was received after 20 days?

THE COURT: You did not appeal from the plea agreement and the no contest plea that you entered. You didn't file a timely appeal.

MR. FOLSE: Judge, I did file a timely appeal. And there's notes that I sent to you, notes from somebody in the clerk's office --

THE COURT: Then you can appeal -- Mr. Folse, you can appeal my order to the West Virginia Supreme Court of Appeals. That's how it works.

(A.R., at 101-102).

The written order stated:

> Based upon its review of the record, and the proffers of the parties at hearing, this Court finds that the satisfactory entry of the Defendant's no contest plea resolved the Defendant's underlying criminal case in Magistrate Court Case No. 19-M31M-03409, and

> consequently, this matter as well. Accordingly, in light of the Defendant's entry of his no contest plea in 19-M31M-03409, this Court ORDERS that the instant matter, Case no. 21-MAP-12, is hereby DISMISSED.

(A.R., at 87-88).

The Court's order also determined that the Motion to Dismiss and Motion to Modify Bond were "untimely" due to the entry of the plea, and denied the motions. It is from this order that the Petitioner now appeals.

SUMMARY OF ARGUMENT

The Petitioner, who was not represented by counsel during the entry of his no contest plea, was statutorily entitled to an appeal, and a trial *de novo* before the Circuit Court, contrary to the determination of the Circuit Court below. The Circuit Court's rationale was that the Petitioner's entry of a guilty plea foreclosed any appeal. However, this determination was in error. W. Va. Code §50-5-13(e), as well as Rule 20.1(a) of the West Virginia Rules of Criminal Procedure for Magistrate Courts only proscribe appeals for those persons who entered a guilty plea with the assistance of counsel. The Petitioner, by contrast, was unrepresented.

Furthermore, even such represented defendants are entitled to an appeal if they possess grounds for extraordinary relief. The Circuit Court did not afford even such baseline review to the Petitioner, who raised a speedy trial issue, and a lack of probable cause, among other issues. The Circuit Court neither considered nor made findings on any of these claims. Additionally, to the extent that the Circuit Court's decision to deny the appeal rested on any uncertainty concerning whether an appeal had actually been filed, that issue had been addressed by Judge Scott in the mandamus proceeding, in a final order that was not appealed by the State, wherein the Petitioner was permitted to re-file the notice of appeal to resolve that question.

The Petitioner is also entitled to relief on his collateral claims. The Petitioner asserted a facially valid speedy trial claim, as W. Va. Code §62-3-21 requires discharge whenever three terms of court pass without trial on an appeal of a conviction from an inferior court. The only question, which was not satisfactorily addressed by the Circuit Court, is whether the Petitioner failed to originally file an appeal, or whether the magistrate court simply refused to docket it. Additionally, the Petitioner's warrantless arrest was without probable cause in the first instance, and any evidence arising from it must be excluded, rendering the prosecution untenable. The Petitioner seeks a remand to the Circuit Court for the scheduling of a trial, and for further consideration of his collateral claims.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is suitable for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure as it implicates constitutional questions relating to the Circuit Court's ruling (or rather failure to rule) on the collateral issues raised by the Petitioner below. Alternatively, Rule 19 argument is appropriate as this matter involves an unsustainable exercise of discretion by the lower court in a matter of settled law. Resolution by signed opinion is appropriate, or alternatively, by a "limited circumstances" memorandum decision remanding the matter to the lower court.

ARGUMENT

1. The Circuit Court erred by dismissing the Petitioner's appeal of his magistrate court conviction following an uncounseled plea agreement by denying him the *de novo* trial to which he was entitled pursuant to W. Va. Code §50-5-13, and other applicable relief.

The following standard of review is applicable to this appeal:

> "This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review

> challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo." Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

State v. Spade, 225 W.Va. 649, 695 S.E.2d 879, 884 (2010).

It is beyond doubt that a defendant who pleads guilty (or no contest)[3] without the assistance of counsel, is fully entitled to an appeal to the Circuit Court, both by court rule and by statute:

> (e) Notwithstanding any other provision of this code to the contrary, there shall be no appeal from a plea of guilty *where the defendant was represented by counsel at the time the plea was entered*: Provided, That the defendant shall have an appeal from a plea of guilty where an extraordinary remedy would lie or where the magistrate court lacked jurisdiction.

W. Va. Code §50-5-13(e) (emphasis added).

> (a) *Except for persons represented by counsel at the time a guilty plea is entered*, any person convicted of a misdemeanor in a magistrate court may appeal such conviction to the circuit court as a matter of right[...]

Rule 20.1(a) of the West Virginia Rules of Criminal Procedure for Magistrate Courts (in part, emphasis added).

Prior to the enactment of the present version of the aforementioned statute and rule, this Court found that a person who entered a guilty plea, irrespective of whether that individual had the assistance of counsel, could appeal and receive a *de novo* trial in the Circuit Court. "Pursuant to the provisions of W.Va.Code, 50-5-13 [1976], a defendant who pleads guilty in magistrate court to a criminal offense may appeal to circuit court, and to obtain such an appeal,

3 *See*, *State v. Caceda*, No. 101455 (W. Va. Feb. 25, 2011) (memorandum decision).

the defendant need not allege error committed by the magistrate court." Syllabus, *State ex rel. O'Neill v. Gay*, 285 S.E.2d 637, 169 W.Va. 16 (1981). *See also*, *State v. Kerns*, 394 S.E.2d 532, 183 W.Va. 130 (1990) n. 4.

Subsequently, on several occasions, the most recent of which was 1994, W. Va. Code §50-5-13 was amended, and now reads, in its entirety, as follows:

> §50-5-13. Appeals in criminal cases.
>
> (a) Any person convicted of an offense in a magistrate court may appeal such conviction to circuit court as a matter of right by requesting such appeal within twenty days after the sentencing for such conviction. The magistrate may require the posting of bond with good security conditioned upon the appearance of the defendant as required in circuit court, but such bond may not exceed the maximum amount of any fine which could be imposed for the offense. The bond may be upon the defendant's own recognizance. If no appeal is perfected within such twenty-day period, the circuit court may, not later than ninety days after the sentencing, grant an appeal upon a showing of good cause why such appeal was not filed within the twenty-day period. The filing or granting of an appeal shall automatically stay the sentence of the magistrate.
>
> (b) In the case of an appeal of a criminal proceeding tried before a jury, the hearing on the appeal before the circuit court shall be a hearing on the record. In the case of an appeal of a criminal proceeding tried before the magistrate without a jury, the hearing on the appeal before the circuit court shall be a trial de novo, triable to the court, without a jury.
>
> (c) In the case of an appeal of a criminal proceeding tried before a jury, the following provisions shall apply:
>
> (1) To prepare the record for appeal, the defendant shall file with the circuit court a petition setting forth the grounds relied upon, and designating those portions of the testimony or other matters reflected in the recording, if any, which he or she will rely upon in prosecuting the appeal. The prosecuting attorney may designate additional portions of the recording. Unless otherwise ordered by the circuit court, the preparation of a transcript of the portions of the recording designated by the defendant, and the payment of the

cost thereof shall be the responsibility of the defendant: Provided, That such costs may be waived due to the defendant's indigency. The circuit court may, by general order or by order entered in a specific case, dispense with preparation of a transcript and review the designated portions of the recording aurally.

(2) The designated portions of the recording or the transcript thereof, as the case may be, and the exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for appeal, and shall be made available to the defendant and the prosecuting attorney.

(3) After the record for appeal is filed in the office of the circuit clerk, the court may, in its discretion, schedule the matter for oral argument or require the parties to submit written memoranda of law. The circuit court shall consider whether the judgment or order of the magistrate is:

(A) Arbitrary, capricious, an abuse of discretion or otherwise not in conformance with the law;

(B) Contrary to Constitutional right, power, privilege or immunity;

(C) In excess of statutory jurisdiction, authority or limitations or short of statutory right;

(D) Without observance of procedure required by law;

(E) Unsupported by substantial evidence; or

(F) Unwarranted by the facts.

(4) The circuit court may take any of the following actions which may be necessary to dispose of the questions presented on appeal, with justice to the defendant and the state:

(A) Dismiss the appeal;

(B) Reverse, affirm, or modify the judgment or order being appealed;

(C) Remand the case for further proceedings, with instructions to the magistrate;

(D) Finally dispose of the action by entering judgment on appeal; or

(E) Retain the matter and retry the issues of fact, or some part or portions thereof, as may be required by the provisions of subdivision (5) of this subsection.

(5) If the circuit court finds that a record for appeal is deficient as to matters which might be affected by evidence not considered or inadequately developed, the court may proceed to take such evidence and make independent findings of fact to the extent that questions of fact and law may merge in determining whether the evidence was such, as a matter of law, as to require a particular finding. If the party appealing the judgment is also a party who elected to try the action before a jury in the magistrate court, and if the circuit court finds that the proceedings below were subject to error to the extent that the party was effectively denied a jury trial, the circuit court may, upon motion of the party, empanel a jury to reexamine the issues of fact, or some part or portions thereof.

(6) The review by the court and a decision on the appeal shall be completed within ninety days after the appeal is regularly placed upon the docket of the circuit court.

(d) In the case of an appeal of a criminal proceeding tried without a jury, the party seeking the appeal shall file with the circuit court a petition for appeal and trial de novo. The exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for appeal and shall be made available to the parties.

(e) Notwithstanding any other provision of this code to the contrary, there shall be no appeal from a plea of guilty where the defendant was represented by counsel at the time the plea was entered: Provided, That the defendant shall have an appeal from a plea of guilty where an extraordinary remedy would lie or where the magistrate court lacked jurisdiction.

W. Va. Code §50-5-13.

The statute as currently written contemplates three forms of review. The first is a review on the record before the Circuit Court, which is the procedure when there was a jury trial held

in the Magistrate Court, as described in subsection (b) and (c) above. This procedure clearly does not apply to the Petitioner, as there was no jury trial held before the Magistrate Court. The second form of review is a *de novo* trial before the Circuit Court, as described in subsection (d). As the matter resolved in the Magistrate Court without a jury, this is the appropriate procedure to apply to the Petitioner's case.

The third form of review is a limited form of collateral review that is available to persons who **were** represented by counsel at the time of the plea, as described in subsection (e). This form of review is to determine whether an extraordinary remedy (i.e., grounds that would support a writ of habeas corpus or coram nobis) would exist. It is clear that, at bare minimum, the Petitioner would be entitled to such review on appeal, as it inures even to defendants who have the benefit of counsel at their plea hearings. However, the Circuit Court gave no consideration to the Petitioner's collateral claims, raised in the Petition for Appeal and the Motion to Dismiss, concerning his speedy trial rights, and the lack of probable cause underlying his arrest, among others. These issues are addressed more specifically in the next argument section of this brief.

Although the State below contended that the Petitioner never properly perfected the Petition for Appeal, that issue was finally determined in the mandamus proceeding before Judge Scott, and never appealed by the State. Consequently, Judge Scott's determination that the Petitioner should be entitled to re-file the Petition for Appeal is *res judicata* and the State is collaterally estopped from further re-litigation of that question. "1. Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party

to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syl. Pt. 1, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). The exact same arguments relied upon by Judge Gaujot in denying relief ("[y]ou didn't file a timely appeal") (A.R., at 102), had already been presented, at length, to Judge Scott in the mandamus proceeding. (A.R., at 47-56, 64-66). The Petitioner complied with Judge Scott's final judgment (A.R., at 67-68) permitting him to file the Petition for Appeal within 20 days. (A.R., at 69-77). The State never appealed the decision. Having perfected the appeal, the Petitioner is entitled to his statutory appellate right of a trial *de novo* before the Circuit Court.

2. The Circuit Court erred by failing to make any findings on several collateral claims raised in the Petitioner's Petition for Appeal and/or Motion to Dismiss: (a) that his speedy trial rights were violated, and (b) that his charges lacked any probable cause.

The Petitioner, both in his Petition for Appeal, and his subsequently filed Motion to Dismiss, raised a number of collateral claims, including a speedy trial claim (A.R., at 82-84), and an arrest in the absence of probable cause. (A.R., at 70, 78-79). The Petitioner had already previously raised the speedy trial claim in the magistrate court, but it was not apparently ever ruled upon. (A.R., at 36). The Circuit Court failed to give adequate consideration to these questions, instead simply ruling, erroneously, that the Petitioner's entry of a plea obviated his right to an appeal. (A.R., at 87-88). It is clear that any defendant, including one who had been represented by counsel, would be entitled to have, at bare minimum, review on the merits of these questions.

> (e) Notwithstanding any other provision of this code to the contrary, there shall be no appeal from a plea of guilty *where the defendant was represented by counsel at the time the plea was entered*: Provided, That the defendant shall have an appeal from a

> plea of guilty where an extraordinary remedy would lie or where the magistrate court lacked jurisdiction.

W. Va. Code §50-5-13(e) (emphasis added).

Both of the aforementioned issues implicate legal questions that this Court has previously designated as appropriate constitutional questions for collateral relief in the context of post-conviction habeas corpus, which would qualify as an "extraordinary remedy" under the statute. Specifically, *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981) lists "denial of right to speedy trial," and "irregularities in arrest," as suitable issues to raise in that context. *Id.*, 277 S.E.2d at 611. The Petitioner asserts that the failure to consider these issues, as well as the ultimate failure to grant relief, constitutes error, and must be reversed.

a. Speedy Trial claim

The Petitioner's magistrate appeal to Circuit Court is straightforwardly subject to the speedy trial rights encapsulated in W.Va. Code §62-3-21:

> §62-3-21 Discharge for failure to try within certain time.
> Every person charged by presentment or indictment with a felony or misdemeanor and, remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the state being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict; and *every person charged with a misdemeanor before a justice of the peace, city police judge, or any other inferior tribunal, and who has therein been found guilty and has appealed his conviction of guilt and sentence to a court of record, shall be forever discharged from further prosecution for the offense set forth in the warrant against him if after his having appealed such conviction and sentence, there be three regular terms of such court without a trial,* unless the failure to try him

> was for one of the causes hereinabove set forth relating to proceedings on indictment.

Id. (emphasis added).

As this Court has previously held, W.Va. Code §62-3-21 is the legislative manifestation of the speedy trial right contained in Article III, Section 14 of the West Virginia Constitution. *See*, Syl. Pt. 1, *Good v. Handlan*, 176 W.Va. 145, 342 S.E.2d 111 (1986). Syl. Pt. 3 of *State ex. rel Stiltner v. Harshbarger*, 170 W.Va. 739, 296 S.E.2d 861 (1982) construed "three regular terms of such court" to be one year in the context of magistrate court proceedings.

The Petitioner asserts that he filed a Petition for Appeal on or about January 6, 2020, and then he filed the original Motion to Dismiss in the magistrate court after the passage of one year on January 11, 2021. The State, of course, claimed that the Petitioner had not actually filed the Petition for Appeal following the plea agreement. This is despite significant circumstantial evidence to the contrary, including in the handwritten notes present in the magistrate court file, which note that the State was served with an appeal on January 6, 2020, and that the Petitioner called into the Magistrate Court office on January 13, 2020. (A.R., at 37, 39). The notes further seem to indicate that the Petitioner was told that an individual named "Ami" would by processing the appeal, and that someone (presumably the Petitioner) called Ami several times. (A.R., at 37). It is difficult to imagine why a person would be dedicated to handling an appeal that did not exist. It seems more probable that the magistrate court staff elected not to docket the petition for appeal because of a mistaken belief that it was improper. If the Circuit Court did not have adequate information to make a ruling in that regard, it should have held an evidentiary hearing on the matter, as it is statutorily empowered to do.

> (5) If the circuit court finds that a record for appeal is deficient as to matters which might be affected by evidence not considered or

> inadequately developed, the court may proceed to take such evidence and make independent findings of fact to the extent that questions of fact and law may merge in determining whether the evidence was such, as a matter of law, as to require a particular finding. If the party appealing the judgment is also a party who elected to try the action before a jury in the magistrate court, and if the circuit court finds that the proceedings below were subject to error to the extent that the party was effectively denied a jury trial, the circuit court may, upon motion of the party, empanel a jury to reexamine the issues of fact, or some part or portions thereof.

W. Va. Code §50-5-13(c)(5).

The Circuit Court's failure to consider or grant relief on this issue constitutes reversible error, and this Court should remand the matter for a judgment discharging the prosecution, or for further consideration.

b. Arrest without probable cause

The Petitioner asserted that his arrest was unlawful in the first instance, and that all matters arising from it must be suppressed, which would have the practical effect of ending his prosecution. While law enforcement claimed that the Petitioner was subject to a no trespass notice on all WVU property, such an order is clearly illegal. The United States District Court for the Northern District of West Virginia has examined a factual issue nearly identical to the present issue, down to the same building, and its reasoning is highly persuasive. In *Williams v. West Virginia University Bd. Of Governors*, 782 F. Supp. 2d 219 (N.D.W. Va. 2011),[4] the District Court addressed a situation in which an individual who was present in the MountainLair was given a trespassing form barring him from all WVU buildings. *Id.*, at 221. The District Court held that the campus trespass statute, W. Va. Code § 61-3B-4, under which the Petitioner was also prosecuted, did not grant WVU the authority to ban individuals from

4 This is the "order granting summary judgment in a federal case" that was noted by Judge Gaujot as having been sent by the Petitioner during the September 3, 2021 hearing. (A.R. 94).

portions of campus that do not constitute "residence halls" or "student facilities" pursuant to the statute, finding that portions of the MountainLair from which persons under 21 are not excluded could not be within the scope of that statute. *Id.*, at 225-226.[5] "The Trespassing Form issued to Mr. Williams was allegedly issued pursuant to West Virginia Code § 61–3B–4(b), yet nothing in that statute authorizes the banning of an individual from all or a portion of the University campus." *Id.*, at 226. The statute has not been amended in the interim. Furthermore, the Petitioner's attendance at this public meeting was protected by W. Va. Code §6-9A-1, *et seq.*, the Open Governmental Proceedings Act. His forcible exclusion implicates the First Amendment rights to assembly and right to petition for redress of grievances. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston, Texas v. Hill*, 482 U.S. 451, 462-463 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). Surely this principle extends to the freedom to challenge state action of all sorts without forcible detainer.

The criminal complaint in this case indicates that the Petitioner was approached by law enforcement because of his alleged trespass, concerning which he was ultimately charged with a violation of § 61-3B-4. It is concerning that WVU, a state actor, continues to seek prosecution of individuals for violation of a statute in a manner that directly contradicts the legal conclusions of the Northern District. Nevertheless, it is clear that the Petitioner was not present in either a "residence hall" or "student facility" as defined in the statute. Thus, the officer had no lawful basis for arresting the Petitioner, who was present at a public meeting of a government body. There was no lawful basis – no probable cause – for a warrantless arrest.

5 The District Court also addressed other aspects of the trespassing form that have subsequently been modified and are not necessarily germane to this case, including the lack and/or sufficiency of an appeal mechanism.

The standard for a warrantless misdemeanor arrest has been previously set forth by this Court:

> This Court dealt with a warrantless misdemeanor arrest in *Simon v. West Virginia Department of Motor Vehicles*, 181 W.Va. 267, 382 S.E.2d 320 (1989), and held as follows in the syllabus: "Probable cause to make a misdemeanor arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that a misdemeanor is being committed in his presence."

State v. Davisson, 209 W.Va. 303, 547 S.E.2d 241 (2001).

There is simply nothing that occurred that meets this level of scrutiny to justify the actions of the officer. There is no allegation in the criminal complaint that the Petitioner was doing anything other than sitting quietly at an open meeting prior to the officer's intervention. (A.R., at 11). The officer had no lawful authority to interfere with the Petitioner's presence at that meeting. The only alleged "obstruction" is that the Petitioner supposedly swung an arm on his way to the floor after being illegally seized by the officer. This entire exchange is an embarrassment to a purportedly free society. There was no trespass, there was no disorderly conduct, and the only reason there is the barest hint of obstruction is because the officer put hands on the Petitioner in an unlawful manner – yet it is no crime to resist an unlawful arrest.

The officer had already unlawfully arrested the Petitioner when the alleged obstruction took place. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syllabus point 1, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987). As this Court recently observed:

> If an officer attempts to make an unlawful arrest, the suspect may resist arrest. In *State v. Gum*, 68 W. Va. 105, 69 S.E. 463 (1910), we held:

> If an attempted arrest be unlawful, the party sought to be arrested may use such reasonable force, proportioned to the injury attempted upon him, as is necessary to effect his escape, but no more; and he cannot do this by using or offering to use a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest.
>
> Syl., in part, *id.*; see also *State v. Mullins*, 135 W. Va. 60, 64, 62 S.E.2d 562, 564-65 (1950) ("If, as the State claims, [the officer] did not have the legal right to arrest [the defendant] unless he was in a state of gross intoxication, and the proof does not disclose that [the defendant] was in such a state of gross intoxication, then Chapman had the right to resist arrest.").

State v. Cox, No. 20-0227 at *6 (W. Va. Jan. 20, 2021) (memorandum decision).

The Petitioner asserts that this entire prosecution is predicated on this unlawful arrest, and cannot be sustained in the absence of probable cause to support the arrest in the first place. Pursuant to the exclusionary rule, all testimony concerning and derived from the arrest should be suppressed. *See, e.g., State v. Barefield*, 814 S.E.2d 250 (W. Va. 2018). The effect would be to render the prosecution a dead letter. The Circuit Court erred by failing to consider this matter, or to grant relief upon it, and this Court should reverse and remand for further proceedings.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Court vacate the order of the Circuit Court denying the Petitioner's appeal, and remand the matter for a de novo trial and further consideration of the Petitioner's collateral claims, or grant any other relief the Court deems just and proper.

Respectfully submitted,

JAY FOLSE, Petitioner,

By counsel,

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.: 21-0972

State of West Virginia,
Respondent,

v.

(An appeal of a final order of the Circuit Court of Monongalia County, Case No.: 21-MAP-12)

Jay Folse,
Petitioner.

CERTIFICATE OF SERVICE

On this 14th day of March, 2022, I, Jeremy B. Cooper, hereby certify to this Court that I have delivered a true and exact copy of the foregoing Petitioner's Brief to Mary Niday, 1900 Kanawha Blvd. East, State Capitol, Building 6, Suite 406, Charleston, WV 25305.

Jeremy B. Cooper
WV State Bar ID 12319
Blackwater Law PLLC
6 Loop St. #1
Aspinwall, PA 15215
Tel: (304) 376-0037
Fax: (681) 245-6308
jeremy@blackwaterlawpllc.com